BEFORE THE DOCKET FILE COPY ORIGINAL

Federal Communications Commission

WASHINGTON, D.C.

92-265

In the Matter of	)	
	)	
Implementation of Section 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-265
	)	
Development of Competition and Diversity of Video Programming Distribution and Carriage	)	

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS OF INTERNATIONAL FAMILY ENTERTAINMENT, INC.

International Family Entertainment, Inc. ("IFE"), in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the captioned proceeding (released December 24, 1992), hereby files its comments concerning the development of competition and diversity in video programming distribution and carriage, pursuant to the Cable Television Consumer Protection and Competition Act of 1992 (the "Cable Act"). The Commission's rules should encourage necessary investment by cable companies in program producers and vendors, while still protecting consumers from the harm resulting from anticompetitive practices.

A. IFE's Interest in this Proceeding

1. IFE owns and operates The Family Channel, a 24-hour per day cable television network that is primarily distributed through cable television systems throughout the United States. The Family Channel provides family-oriented entertainment,

including original made-for-television moves, dramatic and comedy series, inspirational programs and children's programming.

2. The Family Channel is a leader among basic cable networks in the development of original programming. Since September 1988, it has developed, through co-production arrangements, approximately $245 million of original programming for the network, at a cost to IFE of approximately $91 million. As part of its effort to increase the variety of programs available to consumers, IFE has also publicly announced plans to launch a new cable program network, The Game Channel.

3. In order to meet its continuing commitment to produce original programs, IFE has needed to raise substantial amounts of capital from outside sources. IFE's experience has been that cable system operators have been among those most willing to make the necessary investments in new programming ventures. It is vitally important that cable system operators be able to continue to make these investments. Otherwise, it will not be feasible for networks such as the Family Channel to continue to produce high-quality original programming.

4. The Commission's regulations implementing the Act must therefore not work to hinder cable company investments by imposing burdensome and unnecessary regulations on cable programmers that accept such investments. IFE's comments seek to help the Commission fashion rules that will encourage continued investment by cable companies in program producers

and vendors, while still serving to protect consumers from harm resulting from anticompetitive practices.

B. The Appropriate Standards for Determining Vertical Integration Under the Act

5. The Commission has stated its belief that the Act's proscriptions and regulatory requirements pertaining to "discriminatory" practices by cable operators are intended to apply only to cable program vendors that are deemed to be "vertically integrated" with a cable operator. The Commission has therefore requested comments as to the standard that should be used to determine whether a vendor is in fact vertically integrated. (NPRM, ¶¶ 6ff).

6. The Commission should adopt a rule that a cable programmer is vertically integrated with a cable operator if the cable operator actually controls the programmer. In determining whether an operator has control, the Commission should use the indicia which it has traditionally used for the broadcast industry. See e.g., CBS Management Changes (Transfer of Control Allegations), 61 RR 2d 413 (1986). By using this standard, the Commission will impose regulatory burdens only on those programmers with pricing policies controlled and directed by a cable company, where price discrimination can be a problem, without chilling programmers' willingness to accept necessary substantial investments from cable operators.

7. Alternatively, if the Commission believes it must adopt some mechanical threshold to find integration, it should

adopt a rule that <u>if a cable company owns stock giving it 25% of the voting power in a cable programmer</u>, then that programmer should be presumptively found to be vertically integrated.[1/] This is the statutory standard used to determine when there is indirect illegal alien control of a corporate licensee. 47 U.S.C §310(b)(4). The standard will permit cable operators to make the kinds of substantial investments in programmers that are necessary to ensure continued funding in innovative programming, while still protecting consumers from the dangers of anticompetitive conduct resulting from control of a cable programmer by a large cable operator.

8. IFE believes that it would gravely imperil necessary cable industry investment in cable programmers if the threshold for vertical integration were set at the five-percent level used for attribution of ownership in the broadcast industry, or even at the ten-percent level currently being considered for that industry. The broadcast threshold is designed to implement radically different policies and should therefore not be used in connection with the Act's attempt to protect anticompetitive harm to cable viewers.

9. The Commission's attribution rules in the broadcast industry are the result of an effort, beginning in the 1940's, to limit the multiple ownership of broadcast facilities so as

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1/ The Commission's rules should focus on voting power, rather than on a mechanical counting of shares. Thus, for example, if one class of shares has ten times the vote of another, then the threshold should require enough shares to control twenty-percent of the <u>weighted</u> votes.

"to promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent undue concentration of economic power contrary to the public interest." Multiple Ownership Rules, 55 RR 2d 1465 (1984), quoting Amendment of Multiple Ownership Rules (Docket No. 8967), 18 FCC 288, 291-92 (1953). It was in order to ensure this "diversification of ownership" that the Commission adopted the rule that a five-percent holding would be an attributable ownership interest. Id. By contrast, the Cable Act's goal is not to prevent cable operators from investing in "too many" programmers or to insure diverse ownership of program producers and vendors. Indeed, Congress has recognized -- and IFE's experience confirms -- that cable operators should be encouraged to invest in various programmers in order to help finance innovative programs. The Act's proscriptions on "vertically integrated" cable programmers are designed instead to protect consumers from harm that may result from anticompetitive practices. The highly restrictive broadcast attribution rules are inappropriate for facilitating this totally different goal, and would have the effect of stifling vital investments in new and innovative programs.

10. Indeed, in view of the limited purposes of the Act, a cable programmer should also be permitted to rebut the threshold standard of vertical integration, by showing that a minority cable company stockholder of greater than a 25% interest was unable to direct the affairs or activities of the

programmer. If a cable company lacks this power to direct the programmer, the danger of anticompetitive damage to consumers will be minimal, and regulatory burdens should therefore not be imposed on the program producer. To make this rebuttal showing, a programmer should be able to establish either that:

(a) The program vendor has a single shareholder with majority voting power, which shareholder is not a cable company. See 47 C.F.R. §73.3555 Note 2(b) (single majority shareholder in broadcast industry); or

(b) The programmer has a set of related or affiliated shareholders with majority voting power, none of which shareholders are cable companies (e.g., two thirty-percent shareholders which are parent and subsidiary corporations); or

(c) The cable company shareholder has no representative on the programmer's board of directors and is therefore in no position to effect management decisions that might result in anticompetitive harm to consumers; or

(d) Other circumstances indicate that the cable company operator stockholder is not in the position to implement business practices by the cable programmer that could have anticompetitive effects on consumers.

11. Under IFE's proposed threshold standard and rule, the Commission will not impose heavy regulatory burdens concerning "discrimination" on a cable programmer merely because a cable operator has determined to make a sizable investment in that programmer. Thus, cable programmers will

not be deterred from accepting investments that will allow for production of the innovative programs which consumers want and deserve. Moreover, as Congress intended, the Commission will be relying to the maximum extent feasible on the marketplace. (NPRM ¶12, citing section 2(b)(2) of the Act).

C. The Appropriate Standards for Judging Whether Conduct Causes Significant Anticompetitive Harm

12. The Commission seeks comments on the showing of harm that a complainant should be required to make in order to establish that a vertically integrated cable programmer has violated section 628 of the Act. (NPRM, ¶¶ 10-11). IFE, which is dedicated to the production of high-quality programs for cable viewers, believes that the focus of the antidiscrimination provisions should be on those viewers, not on the business interests of different multichannel competitors. This approach is consistent with the intent of Congress, whose concern for the ultimate viewers is made clear by the Act's title: the "Cable Television Consumer Protection and Competition Act of 1992." (Emphasis supplied). It is also consistent with the antitrust laws, which were enacted "for the protection of competition not competitors." Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (emphasis in original).

13. Indeed, to ensure that the focus remains on the proper beneficiaries, the viewers, the Commission should: (a) require a cable company challenger to show that any disparity in prices or other terms and conditions is reflected

in the favored cable company's retail price to <u>subscribers</u>; and (b) <u>require that the challenger pass-through to its customers any lower rate resulting from a determination that a vertically integrated producer has charged discriminatory prices</u>. For example, if a multichannel operator proves that a vertically integrated producer has without justification charged six cents less to another (integrated) local cable operator, then the Commission's rules should require that any resulting six cent reduction to the first operator be reflected in a six cent reduction to subscribers. It would not serve consumers at all if price rollbacks resulting from findings of discrimination were allowed to inure to cable operators; this would merely give certain multichannel operators a windfall and allow them to pad their profit margins. The Commission should ensure that the Act benefits its intended beneficiaries -- the consumers -- by requiring a pass-through of lower rates to subscribers.

14. IFE also supports the Commission's apparent intention to require a complainants to show injury to competition in a <u>local</u> franchise territory in order to establish a violation of section 628. (<u>See</u> <u>NPRM</u> ¶ 11). As the Commission suggests, there can be anticompetitive harm only where a vertically integrated cable programmer charges discriminatory prices to different multichannel system operators in the same franchise area. There is no antitrust injury even if there happens to be a difference in program price to systems in two different geographic areas such as

Tucson and Orlando. (NPRM at n. 28).[2/] For similar reasons, the prohibitions of section 628 should apply to programmers only in connection with their pricing in markets where they sell to a cable company with which they are vertically integrated. (See NPRM ¶11).

D. Appropriate Standards For Finding "Discrimination"

15. The Commission should regulate only those price differentials which are truly "discriminatory" and should take special precautions not to interfere with differences resulting from legitimate business behavior in the marketplace. (See NPRM ¶ 15). For example, the Commission should not interfere with a practice used by IFE of offering a lower rate to an MSO that carries The Family Channel on a large percentage of its cable systems, with higher rates imposed for carriage on fewer systems. This practice encourages carriage of The Family Channel, thereby increasing IFE's revenues and allowing it to produce expensive original programs. Any attempt to tamper with this practice, or to force prices down to the lowest volume discount rate, would be directly contrary to Congressional intent and the public interest: it would only decrease the ability of IFE and others to generate the funds necessary to produce new and original programs and therefore hurt consumers.

2/ If a challenger cable operator later becomes a competitor of the vertically integrated operator in a local franchise area (e.g., through an acquisition), then a complaint could of course be filed at that time.

16. The Commission should also avoid interfering with minute differences in price, focusing only on price differentials that exceed a "reasonable range." (NPRM, ¶20). IFE believes that the Commission should use a benchmark based on a significant percentage different in subscribers' bills.[3/] This would focus attention on significant harm to the consumer, whom Congress intended to protect, rather than merely tampering with the market so as to favor one multichannel distributor at the expense of another.

17. Moreover, the Commission should regulate against "discrimination" in local markets only if it is caused by vertical integration. Thus, if non-vertically integrated program producers also employ a particular pricing practice in the marketplace, the Commission should not interfere with that practice. (See NPRM ¶ 25). It would be inconsistent with Congress' expressed intent to rely on the marketplace to the maximum extent feasible, to regulate widespread business practices that are not the result of vertical integration. See NPRM ¶ 12; section 2(b)(2) of the Act.

E. The Commission's Restrictions Should Not Apply Retroactively to Existing Contracts

18. IFE supports the Commission's conclusion that any restrictions developed to implement section 628 should not be applied retroactively against existing contracts between

3/ The range of reasonableness is best determined in each particular case, based on specific circumstances. But a minute price differential equal to 2-3% of subscribers' bills can certainly never be significant.

program producer vendors and multichannel video distributors. (NPRM ¶ 27). IFE and other programmers have relied on the terms of their existing contracts with distributors, with their contract rates and increases, in making investments in new and existing series. These investments are in many cases long-term, especially because programmers are forced to acquire or produce series with enough episodes to cover an entire season, not just a limited number of programs. If the Commission's restrictions on contracts were to be retroactive, it could jeopardize IFE's plans and investments for the future. Any retroactive effect could have serious adverse effects on IFE and other program suppliers, thereby harming the intended beneficiaries of the Act -- the consumers.

19. The Commission should also be aware that the price in many of IFE's existing contracts were negotiated as a *quid pro quo* for various other contract provisions. Thus, if the Commissions rules were to change prices, many provisions in these existing contracts could be subject to renegotiation or to litigation about the consequences of price modifications. Indeed, many contracts might well be abrogated as the result of disputes concerning the ramifications of price changes, and substantial disruption of the market would therefore occur. In order to avoid this sort of potentially catastrophic disruption, IFE strenuously urges the Commission to adhere to its tentative conclusion to apply its rules only to new contracts.

CONCLUSION

If drafted correctly, the Commission's rules to implement the anticompetition provisions of the Act can lead to significant benefits to consumers. The regulations should, however, not discourage cable company investment in programmers which is necessary for the production of innovative products. Moreover, the Commission should focus at all times on real harms to the consumer -- the viewing public -- which can be caused by vertical integration, and should ensure that its rules do not result in a windfall to certain multichannel distributors but rather in relief to the intended beneficiaries, the subscribers.

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CERTIFICATE OF SERVICE

I, Louis A. Isakoff, hereby certify that I have this 25th day of January, 1993, caused to be hand delivered copies of the foregoing "COMMENTS OF INTERNATIONAL FAMILY ENTERTAINMENT, INC." to the following:

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